United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1425 B

To be argued by
LAWRENCE IASON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1425

UNITED STATES OF AMERICA,
Appellee,

—v.—

ARON SCHATTEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LAWRENCE IASON,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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STATUTES AND ADDITIONAL AUTHORITY

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Aron Schatten appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 12, 1975 after a two day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 75 Cr. 739, filed July 24, 1975, charged Schatten in one count with the possession of goods and chattels that had been stolen while moving as part of an interstate shipment of freight in violation of Title 18, United States Code, Section 659.

Trial against Schatten commenced on November 3, 1975 and concluded on November 4, 1975 when the jury found Schatten guilty. On December 12, 1975 Judge Wyatt sentenced Schatten to a term of three years' imprisonment, which Schatten is now serving.

Immediately following the imposition of sentence, Judge Wyatt granted the Government's motion to remand Schatten. Upon Schatten's request for time to arrange his personal affairs, Judge Wyatt directed him to surrender on December 15, 1975. On December 15, 1975, while Judge Wyatt was out of the city, Schatten again moved, before the Honorable Henry F. Werker, United States District Judge, to have his surrender adjourned. Judge Werker postponed the surrender until December 19, 1975. On December 18, 1975, while Judge Wyatt still was out of town, Schatten's counsel requested an additional continuance of Schatten's surrender. Judge Werker denied this request and ordered Schatten to surrender on December 19, 1975.

On December 18, 1975 Schatten filed a "Motion for Release Pending Appeal from the Judgment of Conviction" in the United States Court of Appeals for the Second Circuit. A panel of this Court (Hays, Timbers and Gurfein, *C.JJ.*) heard oral argument on the motion on December 19, 1975, at the conclusion of which the panel denied the motion (with Judge Gurfein dissenting) and ordered that this appeal be expedited.

Statement of Facts

I. Summary

On July 17, 1974 a delivery truck full of merchandise was stolen from a street in Manhattan on which it was parked. Shirts that had been on the truck were later recovered from a company called B.V. Imports. B.V. Imports had purchased the shirts from Star Sportswear less than one week after the original theft. According to Moses Goldberger, the owner of Star Sportswear, he had acquired the shirts from a man he had never met before, who had come into his store offering to sell the shirts for

cash. Goldberger agreed to buy the shirts, with payment to be made by a check payable to cash. A day or two later two men delivered the shirts to Star Sportswear. When Goldberger complained to the deliverymen about the shirts, they told him to call their boss and handed him a card bearing the name of the defendant, Aron Schatten, and that of his company, Arpen Trucking. As agreed, Goldberger paid the men with a check made out to cash. A few days later, this check was endorsed and cashed by Isaac Moucatel, who testified that he received the check from his good friend Aron Schatten. Schatten testified and admitted asking Moucatel to cash the check for him, but asserted he had received the check in payment for the sale of his wife's engagement ring to a bookmaker named Artie, whose then whereabouts were unknown to him.

II. The Government's Case

On July 17, 1974, at approximately 4:10 or 4:15 p.m., a truck driven by William Greenspun was stolen while parked in the vicinity of 14 East 27th Street in Manhattan. Shortly prior to the theft, Greenspun had exited the truck and entered the building at 14 East 27th Street to pick up freight from a company called Hillborn & Hamburger. When Greenspun returned to the street, his truck had disappeared (Tr. 14-18).*

Greenspun notified the police of the theft of his truck and then returned to Brooklyn to the terminal of his employer, Associated Transport. At approximately 7 or 7:30 p.m. Greenspun left the terminal and began the drive to his home on Nostrand Avenue in Brooklyn. En route, while stopped for a traffic light at the intersection of

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* "Tr." refers to the trial transcript and "GX" to Government Exhibits.

Rutledge Street and Kent Avenue, he saw the truck that had been stolen from him and observed that it was empty (Tr. 18-20).*

At the time of its theft, the truck was carrying a cargo which included thirty-five cartons of shirts from Michelangelo Knitwear, 20 West 33rd Street, New York, New York, that were being shipped to the Richman Brothers Company and to Steins Stores in Cleveland, Ohio (GX 1); radios from three different companies; and umbrellas (GX 2-6). Peter Ferrelli, the president of Michelangelo Knitwear, testified that the shirts on board the stolen truck had a value of between $15,000 to $16,000 (Tr. 35, 42).

During July, 1974 Moses Goldberger, the owner of Star Sportswear, a store located at 155 Orchard Street in Manhattan, bought approximately 1000 to 1500 men's knit shirts from a man he had never met previously. This man came to Star Sportswear with samples of the shirts, offering to sell them to Goldberger for about two dollars apiece in cash. Since Goldberger insisted on paying by check, however, they agreed that payment would be made by a check made out to cash. The man left after a short time. Goldberger was unable to make any in-court identification of that individual (Tr. 53-56).**

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* The garage of Schatten's company, Arpen Trucking, is located at 19 Lorimer Street in Brooklyn—which is a distance of only approximately half a mile, or five to six blocks, from where the empty truck was recovered (Tr. 127-128).

** Goldberger, however, did make a partial, pre-trial identification of Schatten. On January 16, 1975 Ronald Kosednar, a special agent of the FBI, interviewed Goldberger and showed him seven photographs. When asked whether from that lot he could identify the individual who had sold him the Michelangelo shirts, Goldberger selected two photographs, including one of Schatten (Tr. 65-67, 126-127). Furthermore, on cross-examination of Agent

[Footnote continued on following page]

A day or two later two men delivered the shirts. In payment Goldberger gave the deliverymen a check payable to cash in the amount of $2,443.00, post-dated August 1, 1974 and signed by Goldberger (GX 8). Initially Goldberger told the deliverymen he would not accept the shirts because they were not packed in individual boxes and because too many of the shirts were extra large in size. The deliverymen told Goldberger there was nothing they could do about it and that he would have to talk to their boss—thereupon handing Goldberger a business card (GX 9) on which was written "Arpen Trucking Co., Inc." and the name "Aron Schatten" (Tr. 56-63).

Goldberger later sold the shirts to B. V. Imports, giving them an invoice for the same dated July 23, 1974. B.V. Imports paid Star Sportswear with a check in the amount of $4,515.50 dated July 26, 1974 (Tr. 64-65; GX 10-11).

On approximately July 25, 1974, about one week after the initial theft of the truck, Schatten gave the $2,443 check from Star Sportswear (GX 8) to his friend, Isaac Moucatel, the manager of Mercedes Book Distributors—a company for which Arpen Trucking Company, (which Schatten owned) made deliveries—with the request that Moucatel cash it for him.* Schatten, however, did not endorse the check, although Moucatel did. Further, although Schatten's company apparently had its own bank and checking accounts (Tr. 95), Schatten provided Moucatel with no reason for his request, nor did he tell Moucatel where he had obtained the check (Tr. 86-92).

Kosednar, Schatten's attorney elicited the fact that at a line-up conducted subsequent to the photographic display, Goldberger originally selected Schatten and two others as men who might have been the salesman of the shirts he purchased. Goldberger then narrowed his choice to the two men other than Schatten (Tr. 129-130, 137).

* Moucatel had cashed checks for Schatten on six to ten prior occasions (Tr. 91-92).

When Schatten gave Moucatel the Star Sportswear check for $2,443, the latter gave Schatten his personal check for $1,000. Later that day Moucatel withdrew $1,000 in cash from his bank and gave it to Schatten. A few days or a week later Moucatel gave Schatten the balance (Tr. 92-93).

Before Moucatel deposited the Star Sportswear check on August 1, 1974, he asked Schatten whether the check was good. Schatten said it was. After Agent Kosednar interviewed him about the check, Moucatel informed Schatten of the interview.* Schatten told Moucatel the check was good and not to worry about anything (Tr. 91, 101-102).

The Government also proved that in 1972, upon his plea of guilty to Count One of Indictment 71 Cr. 584 (GX 23), Schatten was convicted in the United States District Court for the Eastern District of New York in that he, along with others,

> "embezzled, stole and fraudulently obtained, with intent to convert to their own use, a quantity of Unisonic AM-FM stereos, having a value in excess of One Hundred Dollars ($100.00), from the 21st Street Pier, Brooklyn, New York, which goods were moving as a part of and constituting a foreign shipment of freight from Yokohoma, Japan to New York, New York. (Title 18, United States Code, Section 659; Title 18, United States Code, Section 2.)" **

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* Moucatel met with Kosednar several times. After one of Moucatel's meetings with Kosednar, perhaps the last, Schatten first told Moucatel he had received the Star Sportswear check as a result of selling his wife's ring (Tr. 112-114).

** Upon receiving Schatten's record of conviction in evidence, Judge Wyatt instructed the jury that that evidence was being admitted not to show that Schatten had a bad character or was a bad man but, rather, solely on the issue of Schatten's knowledge and intent with respect to the possessory crime charged (Tr. 145-146).

III. The Defendant's Case

Aron Schatten was the only defense witness. He admitted having possessed and transferred the Star Sportswear check, but claimed he had received it from a man named "Artie" in mid-July 1974, after July 17 (Tr. 150-151). Schatten said he met Artie at a nightclub in the Catskill Mountains, South Fallsberg, New York. Artie was a bookmaker who was taking bets at the racetrack from the owners of horses. Schatten testified that because he needed money he sold his wife's engagement ring to Artie for $2,000. In payment Artie gave Schatten the Star Sportswear check. A few days later Schatten took the check to Goldberger at Star Sportswear to see whether he had issued the check.* Schatten claimed he left his business card with Goldberger at that time. Schatten still had not given the ring to Artie, although he had already received the check in payment from Artie (Tr. 154-160).

Schatten admitted giving the check to his friend Moucatel to cash for him. He claimed he had done so because he recognized he would have a problem cashing it in a bank (assertedly because some unidentified bank employee told him they could not "certify a cash check" (Tr. 162)); and because he did not wish to use his trucking company's checking account for fear his wife would discover he had sold her ring (Tr. 163).

Schatten acknowledged on cross-examination that all he knew about Artie was that he was a bookmaker; that he did not know where Artie lived; and that prior to

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* Goldberger was asked on cross-examination whether he remembered that someone had come to his store and asked whether the check in issue was a good one. Goldberger said it was possible that this had happened, but he did not remember "exactly" (Tr. 76).

receiving the check from Artie, Schatten had seen Artie no more than four times. Schatten acknowledged he never asked Artie where he had obtained the check and that he and Artie did not negotiate about the price of the ring. There was no evidence any bill of sale or other document of title was ever exchanged.

Schatten testified that he gave the ring to Artie some ten or fifteen days after he had first received the check from Artie, and that he had waited for the purpose of allowing the post-dated check to clear. However, Schatten acknowledged that when he first asked Moucatel to cash the check for him, he did not tell Moucatel he had received the check from Artie in exchange for his wife's ring (Tr. 167-177).

Schatten acknowledged that he had pleaded guilty in 1972 to a charge of stealing freight. He claimed, however, that after his trial on that charge had ended with a hung jury, he had pleaded guilty because he did not have the money his attorney was demanding for a second trial and because he had expected leniency. He claimed in connection with the 1972 conviction that another "truckman" had given him papers and told him he would give Schatten "a thousand to bring out some stuff," *i.e.*, 600 cartons of stereo sets (Tr. 185-186), loaded on a pier. Schatten asserted he later discovered that the merchandise was stolen (Tr. 148-149, 184-186).

ARGUMENT

POINT I

The evidence was more than sufficient to support the jury's finding that Schatten knowingly possessed goods stolen from an interstate shipment.

Schatten contends that the evidence of his guilt was insufficient as a matter of law and that the District Judge should have granted his motion for a judgment of acquittal at the close of the Government's case in chief. The contention is plainly in error. While the proof of Schatten's guilt was largely circumstantial, it was nonetheless compelling. Moreover, having chosen to offer evidence at the close of the Government's case in chief, Schatten waived any claim as to the sufficiency of the Government's case considered alone. *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

The test of sufficiency of the evidence, both at the close of the Government's case in chief and at the close of all the evidence, is the same:

> "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt" (citation omitted).

United States v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 82 (1974); *accord*, *United States* v. *Taylor*, 464 F.2d 240, 242-245 (2d Cir. 1972). Viewed in the light most favorable to the Government, as it must be, the evidence amply supported the jury's conclusion that Schatten had at least constructive possession of the stolen shirts with knowledge of their stolen character.

The truck was stolen from Manhattan on July 17, 1974. Later that same day, empty of its cargo, it was recovered in Brooklyn within half a mile of Schatten's garage. Within less than one week after the theft, that is, by July 23, 1974, all of the following had already occurred: (1) Goldberger, an Orchard Street merchant, was approached by a man, previously unknown to him, who offered to sell to him for cash a great quantity of shirts at unusually low prices. (The circumstantial evidence, briefly described below, and Goldberger's partial, pre-trial identification tended to establish that this individual was Schatten);* (2) Goldberger agreed to buy the shirts, with payment to be made upon delivery with a check payable to cash; (3) a day or two later delivery was made by two other men, also unknown to Goldberger, who answered the latter's complaints by handing him Schatten's business card and simultaneously advising him to call their "boss"; and (4) Goldberger resold the shirts in question to B.V. Imports.

By July 25, 1974, Schatten had given to Moucatel, with a request that it be cashed, the very check Goldberger had used to pay the men who had delivered the stolen shirts. Indeed, Schatten himself testified he had received the check in "the middle of July", sometime after July 17 (Tr. 151).** From the foregoing the jury could reason-

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* In his brief Schatten erroneously states that, "Goldberger was not interrogated either as to any photographic identification relating to Schatten or as to a lineup identification involving Schatten" (Brief at 10). Goldberger did testify about the photographic identification (Tr. 66-67), although not about the lineup. FBI Agent Kosednar testified about the latter on cross-examination (Tr. 129-130).

** In light of the proof that Schatten received Goldberger's check within a brief day or two after the delivery, the possibility that the check could have passed through many hands before it wound up in the hands of Artie or Schatten, as Schatten now claims (Brief at 15), is a largely academic and wholly speculative one.

ably have concluded that the two men who had delivered the shirts to Goldberger were agents of Schatten and that Schatten had gained possession, actual or constructive, of those shirts virtually contemporaneously with their theft.

In concluding that Schatten had guilty knowledge of the stolen character of those shirts, the jury could properly have considered the fact that Schatten was willing to sell the shirts for less than half their wholesale cost and had requested payment in cash;* had effected the sale without the customary invoicing, see *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972);** had used men other than his usual employees and a rental truck, rather than his own,*** to deliver the shirts; and had cashed the check, without endorsing it himself, through his friend Moucatel—even though the company Schatten owned had its own bank and checking accounts. Moreover, since Schatten owned what was a trucking company rather than one which manufactured or imported shirts, the jury could properly have concluded that there was no evidence that Schatten's acquisition of the shirts had been by legitimate means.

Finally, in accordance with Judge Wyatt's wholly correct charge, the jury could properly have considered Schatten's 1972 conviction of a similar offense under 18

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* Goldberger testified that he paid approximately $2.00 per shirt (Tr. 54). Peter Ferrelli, president of the company that imported the shirts from Italy, testified that his company sold the shirts at wholesale for $5.00 each (Tr. 33-36).

** Aron Schatten had been a defendant in the *Fried* trial. After the jury was unable to reach a verdict as to Schatten, he pleaded guilty. It was this conviction that the Government proved at the trial below.

*** Goldberger testified that the deliverymen drove a yellow Ryder truck (Tr. 57). Octavio Ortiz and John McMillan testified that they were the only drivers for Arpen Trucking and that they never delivered any merchandise to Star Sportswear and never received the Star Sportswear check (GX 8) (Tr. 43-46, 49-51).

U.S.C. § 659 as probative of his criminal knowledge and intent * and properly inferred such guilty knowledge from Schatten's unexplained possession of recently stolen property. *See, e.g., United States* v. *McCarthy*, 473 F.2d 300, 306-307 (2d Cir. 1972); *United States* v. *Elgisser*, 334 F.2d 103, 108 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964); *United States* v. *Casalinuovo*, 350 F.2d 207, 211 (2d Cir. 1965) (inference available even where possession is constructive rather than actual).

In the wake of the foregoing proof of guilt, Schatten testified to a patently incredible version of the facts, thereby further incriminating himself. While admitting that he had possessed the Star Sportswear check and had given it to Moucatel to cash, Schatten denied even having possessed the stolen shirts. He testified instead that he had sold his wife's ring and in payment had taken the $2443 check, payable to cash and signed by a man he had never met, in the middle of July 1974 in upstate New York from a bookmaker named Artie, whom he hardly knew; and that he did not know Artie's last name, where he lived or from whom Artie had obtained the check. Schatten further testified that although he did not transfer the ring to Artie until the post-dated check cleared, immediately upon his receipt of that check he presented it to Moucatel with a request that the latter cash it. He admitted, however, that prior to his request for encashment, he had not told Moucatel he had received the check in payment for his wife's ring. Schatten produced no other evidence, either documentary or testimonial, tending to corroborate his own testimony.

Plainly the evidence permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt.

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* The admissibility and significance of the prior conviction is discussed in Point III, *infra*.

POINT II

The District Court properly admitted Goldberger's testimony of the statements made to him by the deliverymen.

Schatten claims that the District Court erred in admitting Goldberger's testimony about statements made by the men who delivered the stolen shirts on the ground that the statements were hearsay. Because Schatten failed to object on this ground at trial, he is precluded from raising it on this appeal. In any event, the statements were properly admitted as the statements of Schatten's agents made within the scope of their agency and to explain a simultaneous verbal act.

Goldberger testified that when the stolen shirts were delivered, he had a conversation with the deliverymen. They asked for cash, and Goldberger told them, as he testified he had told the salesman, that he would give them a check payable to cash. Goldberger told the deliverymen he did not like the fact that the shirts were not packed in individual boxes and that so many of the shirts were of extra large size. The deliverymen told Goldberger he had to talk to their boss and handed Goldberger Aron Schatten's business card. Goldberger gave the deliverymen a check to pay for the shirts (Tr. 58, 63; GX 8, 9).

During Goldberger's entire direct testimony regarding his conversation with the deliverymen, Schatten's trial counsel objected only twice. One of the objections stated no grounds (Tr. 61), and the other only that the question was leading (Tr. 62). Both objections were overruled. Schatten's trial counsel never said he was objecting on the ground that the deliverymen's statements were hearsay. *Cf. United States* v. *Glasser*, 443 F.2d

994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). Ordinarily, the failure to state the specific ground for an objection to the admission of certain evidence precludes reversal on appeal based on the specific ground not articulated in the trial court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

In any event Goldberger's testimony about this conversation was admissible. The statements by the delivery men were admissible because the latter were Schatten's agents acting within the scope of their employment. According to Rule 801(d)(2)(D) of the Federal Rules of Evidence, a statement offered against a party is not hearsay if made "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . .".

Referring to a conversation similar to the one which has spurred this complaint from Schatten, this Court has held admissible in a narcotics case the statement of the defendant's agent that he received the heroin from the defendant. The Court said this was an admission by an agent in the course of the performance of his agency. *United States* v. *Campisi*, 248 F.2d 102, 105-106 (2d Cir.), *cert. denied*, 355 U.S. 892 (1957). See also *United States* v. *Kahn*, 472 F.2d 272, 289 n. 21 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973) where the Court held that the grand jury testimony of the president of the defendant corporation was admissible against the corporation without any showing of authorization.*

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* *Cf. United States* v. *Pacelli*, 491 F.2d 1108, 1117 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974), where the Court reaffirmed the principle that statements of defendant's agent are admissible against the defendant, but reversed Pacelli's conviction in part because there was no evidence that the out-of-court statements were made by agents of Pacelli.

Moreover, even the declarations of an innocent agent are admissible against his criminally culpable principal if made within the scope of his agency. *United States* v. *Miller*, 246 F.2d 486, 490 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957).

The statements of the deliverymen were admissible because the character of those men as Schatten's agents was established by a fair preponderance of the evidence.* The existence of this agency, independent of the statements themselves, was established by Schatten's business card, which the deliverymen handed to Goldberger, and by the fact that Schatten received the Star Sportswear check so swiftly after Goldberger had given it to the deliverymen to pay for the stolen shirts.

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* Presumably even with the advent of Rule 801(d)(2)(D) of the Federal Rules of Evidence, which took certain defined agent's statements out of the category of hearsay, the Government, to adduce such statements, must still prove by a fair preponderance of the evidence, independent of the statements themselves, that the declarant was the agent of the defendant and the statements were made within the scope of the agency. This fair preponderance standard applies to the admissibility of coconspirator statements. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970). The same standard must apply to the admissibility of an agent's statements in view of the fact that the admissibility of coconspirators' statements is grounded in agency theory. As Judge Learned Hand wrote in *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 774 (1944):

> "The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

See also United States v. *Renda*, 56 F.2d 601, 602 (2d Cir. 1932); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 988-989 (1959).

Further evidence of that agency was found in the other proof of Schatten's guilt set forth in Point I, *supra*, including the evidence of Schatten's evasiveness in cashing the check through Moucatel.

The deliverymen's statements were also admissible because they related to and served to explain fully the deliverymen's nonverbal act of handing the business card to Schatten. *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-364 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). In *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), the Court held admissible the testimony of the owner of a store who related the contents of a note thrown through the store's window. The note was lost, and the appellant argued that the witness' testimony about the contents of the note was hearsay. The Court held that in view of the circumstantial evidence that one of the conspirators had written or delivered the note:

> "The note was admissible as an utterance which was contemporaneous with an independently admissible nonverbal act—the aciding—and which relates to that act and throws some light upon it. *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed. 2d 134 (1961)." *United States* v. *Glasser*, *supra*, 443 F.2d at 999-1000.

In light of *Glasser* and *Annunziato*, the statements of the deliverymen were clearly admissible to explain why they handed Schatten's business card to Goldberger.

POINT III

The District Court properly permitted the Government to prove that in 1972 Schatten had been convicted of an offense under 18 U.S.C. §659 similar to that charged here.

At the close of its direct case the Government put in evidence Schatten's 1972 conviction for having embezzled, stolen and fraudulently obtained goods which had been moving in foreign commerce (GX 23). Immediately before the certified copy of Count One of Indictment 71 Cr. 584 and the judgment of conviction were read to the jurors, the Court instructed them that this evidence was admissible only on the question of Schatten's knowledge and intent and not to show that the defendant had a bad character or was a bad man (Tr. 142-146).

Schatten contends that evidence of his 1972 conviction should have been excluded because of the general prejudicial impact of proof of another crime, because the 1972 conviction was not for the identical crime charged here and because even if otherwise admissible the prior act was too remote in time. The contentions are devoid of merit. Proof of the prior bad acts was highly relevant to the issue of whether Schatten's possession here of the stolen shirts was accompanied on his part by criminal knowledge and intent. The admissibility of proof of such prior bad acts simply does not require a showing that the latter are identical and committed contemporaneously with the crime charged.

It is settled that evidence of other crimes is admissible if introduced for any purpose other than to show the defendant has a bad character or is a bad person. *E.g.*, *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir. January 12, 1976) slip op. 6577, 6582; *United States* v.

Leonard, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3358 (December 15, 1975); *United States* v. *Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); Rule 404(b), Federal Rules of Evidence. In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potentially prejudicial effect. This question is addressed to the sound discretion of the trial court, whose determination is entitled to great weight. *United States* v. *Leonard*, 524 F.2d 1076, 1080 (2d Cir. 1975); *United States* v. *Brettholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

Schatten's claim that the prior act, to be admissible, must constitute an offense identical to the crime charged is simply wrong. His reliance, for that proposition, on various authorities other than the pertinent Federal decision law is inapposite and grossly misplaced. It is the *similarity* of conduct which determines relevancy, and hence the admissibility of the proof of prior bad acts, rather than any *identity* of language in the statutes which may have been violated. *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir. January 12, 1976) slip op. 6577, 6583; *see United States* v. *Natale*, Dkt. No. 75-1276 (2d Cir., Nov. 28, 1975) slip op. 793, 812-813; *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3358 (December 15, 1975); *United States* v. *McCarthy*, 473 F.2d 300, 303-304 (2d Cir. 1972); *United States* v. *Fried*, 464 F.2d 983—(2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Kaufman*, 453 F.2d 306, 310-311 (2d Cir. 1971).

The proof about which Schatten presently complains established that in 1970 he and others "embezzled, stole

and fraudulently obtained, with intent to convert to their own use, AM-FM stereos . . ." (GX 23)—as a result of which in 1972 Schatten was convicted and imprisoned. Viewed even superficially, the prior misconduct—which constituted a violation of the other paragraph of the very same statute (18 U.S.C. § 659) Schatten was charged with violating here—was substantially similar to the instant charge of criminal possession. Upon closer analysis a virtual identity of character between the two is revealed.

Evidence that Schatten had previously been convicted of having stolen, embezzled and obtained goods by fraud properly permitted, if not virtually compelled, the jury to find as a logical corollary that, as the thief, Schatten had criminally possessed (actually or constructively) those unlawfully acquired goods—the latter misconduct being identical to that charged here.

The relevance to the material issues of knowledge and intent of the proof of such similar, if not identical, prior misconduct is plain. The prior misconduct, and the resulting conviction and two year prison term rendered it substantially less likely—with the grim tutor of imprisonment as a reminder—that Schatten would have allowed himself to become the possessor, by mistake, inadvertence or other innocent reason—of $15,000 worth of shirts stolen shortly theretofore from an interstate shipment, which Schatten then sold without customary invoicing at prices sharply below wholesale.

While it is true that, when eventually revealed, Schatten's defense consisted of an alternative explanation of how he had come to possess the Star Sportswear check and a blanket denial that he had ever had possession of the stolen shirts, there was no guarantee that this would be so when, at the close of its case in chief, the Government offered the challenged evidence. Indeed, Schatten's

trial counsel, in his opening, refrained from revealing the defense theory of the case, saying only that Schatten would testify and explain that his possession of the check in question was innocent in nature (Tr. 13).*

It is well settled that evidence of a similar act is admissible in the Government's direct case where knowledge or intent is at issue, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States* v. *DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970).**

Here, as in *United States* v. *Zochowski*, 331 F. Supp. 1070, 1072, n. 5 (S.D.N.Y. 1971) (Weinfeld, *J.*), *aff'd*, 456 F.2d 1336 (2d Cir. 1972):

> "The defendant's objection that the evidence should not have been received in the government's

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* The assertion of Schatten's present appellate counsel (who did not participate in the trial below) that absent the similar act proof Schatten would not have testified is wholly without support in the record and contradicts the statement of Schatten's trial counsel in his opening (Tr. 13). While concededly Judge Wyatt had advised counsel before their openings that he would permit the prosecution to cross-examine Schatten on the basis of his 1972 conviction, he had expressed then only a preliminary decision to allow government counsel to prove the prior conviction as a similar act in its direct case. This decision was based on the statements of defense counsel that the prior conviction was for the "*same*" offense as that involved in this case, the "possession of merchandise stolen from an Interstate Shipment" (Tr. 5-9). There is no hint in the record that Judge Wyatt's preliminary decision to admit the similar act proof prompted trial counsel to promise in his opening to produce Schatten as a witness.

** In *DeCicco* the Court found that proof of the similar act was irrelevant and had been improperly admitted since the criminal acts charged did not require proof of any specific intent and the defendants had made clear from the outset of the trial that they would defend on the ground that they had never committed the acts charged. Accordingly defendants' intent was never in issue.

> direct case is without substance. The issue of knowledge was the hard core of the case, as was acknowledged in defense counsel's opening; moreover, knowledge is at issue as an essential element of the government's case." [citations omitted]

Knowledge and intent are clearly essential elements in any prosecution for possession of stolen goods. Here, when the Government offered evidence of Schatten's prior conviction, it had already adduced evidence tending to prove, *inter alia*, Schatten's constructive possession of the stolen shirts. While proof of criminal knowledge and intent is often difficult, where, as here, the evidence tends to establish constructive rather than actual possession, the Government's burden of proving criminal knowledge and intent is even higher. *United States* v. *Casalinuovo*, *supra*, 350 F.2d at 211. Under such circumstances, it was entirely proper for the Government to have proved the similar act in its direct case.

Indeed, had the Government rested its direct case without proving the prior misconduct, the defense might well have elected to rest without offering any evidence (indeed present appellate counsel asserts that this is exactly what would have happened) and then chosen to argue to the jury, alternatively, that the Government failed to prove beyond a reasonable doubt that Schatten had ever possessed the stolen shirts or, even assuming the jury was persuaded that Schatten's possession had been established, that the Government had failed its burden to prove that his possession was accompanied by the requisite criminal knowledge and intent. Confronted with those possibilities, the Government's proof of the prior act was timely and entirely proper.

Schatten's claim that the similar act was inadmissible because too remote in time is clearly wrong on the law and

the facts. Little more than two years had passed between the time of Schatten's May, 1972 conviction (for acts committed in 1970) and the delivery of the stolen goods to Goldberger in July 1974. During much of that time Schatten was in prison. Similar acts need not be simultaneous or substantially contemporaneous with the offense in the pending case to be admissible. Schatten's reliance on New York State authorities for a contrary view is thoroughly inapposite. *See, e.g., United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States* v. *Sherman*, 240 F.2d 949, 953 (2d Cir. 1957), *reversed on other grounds*, 356 U.S. 369 (1958).

Finally, it is of substantial significance that of the three factors noted in *United States* v. *Baum*, 482 F.2d 1325, 1331 (2d Cir. 1973), as creating a prejudicial impact on the defendant when proof of similar acts is permitted and consequently as grounds for the exclusion of such evidence, two are not present in this case. First of all, there could be no tendency to convict Schatten "because he has escaped unpunished from other offenses" since Schatten testified that he went to prison as a result of his earlier conviction. Secondly, it cannot properly be suggested that Schatten was "unprepared to demonstrate that the attacking evidence is fabricated" since it was proved irrefutably by Schatten's plea of guilty to the charge.

The evidence was properly admitted not as an unnecessary piece of proof to prejudice the defendant on an uncontested issue, but because of its relevance in establishing Schatten's knowledge and intent—critical issues in the case and difficult to prove. *United States* v. *Bradwell*, 388 F.2d 619, 622 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968).

Under all the circumstances, the decision of the trial court to permit proof of the prior similar act was a proper exercise of its discretion.

POINT IV

The prosecutor's summation was proper and certainly free of any "plain error".

Schatten contends that reversal is mandated because the prosecutor, in his summation, (1) made improper references to, and arguments premised on, Schatten's prior 1972 conviction, and (2) improperly commented on Schatten's failure to call his wife and Artie as witnesses. These contentions are unavailing. The evidence of Schatten's prior misconduct was properly used by the prosecutor solely as a basis properly to suggest to the jury that Schatten's testimony was not worthy of belief and that Schatten's possession of the stolen shirts was marked by criminal knowledge and intent. The prosecutor's inadvertent and mistaken assertion that Schatten had been convicted in 1972 for *selling* stolen radios (rather than for the *theft* of AM-FM stereos) was innocuous and harmless and, given the absence of any defense objection or request for a curative instruction, certainly not "plain error". Rules 30, 52(b), Federal Rules of Criminal Procedure. Moreover, the prosecutor's comments on Schatten's failure to call his wife and Artie who, as witnesses, were uniquely available to the defense were entirely proper as a matter of law.

The Government's opening summation, which covers only 18 pages of the trial transcript (Tr. 198-215), was objected to only once by defense counsel. That objection had nothing to do with the points raised on appeal and was overruled (Tr. 200-201). The Government's rebuttal

summation covers only seven pages of the transcript (Tr. 232-238), and was marked as well by only one objection, which was overruled (Tr. 235). That objection came at a point near the end of the rebuttal summation and only after all of the comments about which Schatten now complains already had been voiced without objection (Brief at 32-36). Schatten's failure to make a timely objection below precludes his assigning those points as error on this appeal; illustrates his difficulty then in finding any impropriety such as is alleged now; and manifests the negligible impact these statements had at the time they were made. *Cf. United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). Schatten's failure to raise any objection to the prosecutor's summation either at the time or immediately afterward in the form of a request for a curative instruction prevented the District Judge from considering whether to give such curative instructions or to declare a mistrial. As this Court said in *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972):

> "When defense counsel has failed even to do that, an appellate court will reverse only if the summation was so 'extremely inflammatory and prejudicial', *United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2d Cir.), *cert. denied*, 385 U.S. 842 . . . (1966), that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings', *United States* v. *Atkinson*, 297 U.S. 157, 160 . . . (1936)."

The prosecutor's summation in this case was hardly inflammatory and clearly did not adversely affect the fairness or integrity of the trial.

Schatten objects to the Government's references in its opening summation to Schatten's prior conviction. These references, which Schatten takes out of context, arose during the prosecutor's discussion of the credibility of Schatten's testimony. The prosecutor first related in some detail the evidence adduced in the Government's direct case. The bulk of the remainder of the summation was an argument that Schatten's testimony was incredible. The prosecutor suggested to the jurors that they could disbelieve Schatten's claim that after once going to prison as a result, in part, of having blindly accepted papers from a stranger, he again was led into troubled waters as a result of having accepted a third-party check from a bookmaker he hardly knew:

> "Here is Mr. Schatten who testified that he had been convicted in 1972 for selling radios that were part of a stolen freight. He is telling you that the reason he got involved in that problem and was convicted and went to jail for 11 months was because some guy gave him some papers and said go on down to the pier and pick up this freight for him, and as a result of that, because he was duped by this man, that is what Mr. Schatten would have you believe, he ended up being convicted in 1972 and serving 11 months in prison, getting out some time, I guess, in 1973, which would mean having been out of prison for only approximately a year's time, now he is taking another piece of paper from a man he has met three or four times, after he just spent 11 months in prison, for being duped by another stranger.
>
> "Does this sound credible to you? Is that the story that you can believe?" (Tr. 209).

Coupling this use of the prior conviction as a predicate for an attack on Schatten's credibility, the prosecutor sought graphically to paint the similarity, if not virtual

identity, between the earlier misconduct and the crime charged.* Since it is the similarity of conduct which determines relevancy, *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir. Jan. 12, 1976) slip op. 6577, 6582, the prosecutor argued for the existence of that near identity of conduct as highly persuasive of Schatten's criminal knowledge and intent. In his opening summation the prosecutor argued without objection:

> "Also, look at the other aspect of this prior conviction that Mr. Schatten testified to. Didn't he tell you that there were radios on that truck, electronic equipment, stereos and didn't we have the testimony from Mr. Katz that his electronic equipment was on the truck that was stolen from Mr. Greenspun on July 17.
>
> "Now, isn't it likely that someone who had a source who would fence or buy stolen radios in 1970 might be able to get to that same source or might think he could in 1974? Doesn't it sound like some kind of common scheme to you?
>
> "Wouldn't it be possible for someone just to watch a delivery man like Mr. Greenspun going into places that sell electronic equipment, seeing him coming out with boxes marked radios, stereos, whatever, and follow him and steal his truck?" (Tr. 209-210).

And similarly in his rebuttal summation he again argued without objection:

> "The government contends that this prior conviction is one other factor that you may consider in evaluating Mr. Schatten's credibility. Also a

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* *Cf. United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851, (1973).

> factor that you may consider in what his intent was here and whether he had these goods he would have known they were stolen or a common scheme to sell radios once again or to steal and sell radios once again as Mr. Schatten had been convicted of selling radios a fairly short time earlier." (Tr. 233).

While concededly the prosecutor inadvertently erred in each of the passages quoted above in asserting that Schatten had been convicted in 1972 of selling stolen radios, the misstatements occasioned no objection and were clearly harmless.* There is little chance the jury was misled to Schatten's prejudice as a result of the misstatement since in this short two-day trial the correct facts of Schatten's conviction were clearly and conclusively established by the judgment of conviction and pertinent portion of the indictment (which the Government put in evidence), Schatten's testimony to the same end and all prior, correct testimonial references to that conviction. Any possible prejudice was cured by Judge Wyatt's instructions that the statements of counsel were not evidence and that it was the jury's recollection that controlled (Tr. 240).

Moeover, while it was incorrect to say that Schatten had been convicted of selling stolen radios, it was surely permissible for the prosecutor to argue to the jury, if otherwise appropriate, that one, like Schatten, who criminally obtained 600 cartons of AM-FM stereos intended

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* This Court has upheld a conviction even where it found that the prosecutor had persisted in referring in summation to facts not in the record after the District Court had sustained the objections of defense counsel on that very ground. *United States* v. *Cirami*, 510 F.2d 69, 73 n. 2 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975). *See also United States* v. *Tortora*, 464 F.2d 1202, 1207 (2d Cir), *cert. denied, sub nom Santoro* v. *United States*, 409 U.S. 1063 (1972).

and expected to sell those goods, rather than employ them for his own personal use. The prosecutor's suggestion of such an inference of prior criminal sale to the jury here was an appropriate and proper part of his effort to draw the similarity between the prior and currently charged misconduct.

While the prosecutor may have been ill-advised to employ the term of art "common scheme" in comparing the prior misconduct with the crime proved here, there was sufficient evidence in the record for him to call to the jury's attention the striking similarities between the two, as they bore on the question of Schatten's criminal knowledge and intent.

Thus, as noted, in 1970 Schatten participated in the theft of an obviously merchantable quantity of AM-FM stereos which, the jury could properly have found, were to be marketed by the thieves. In the instant case, the truck stolen from a Manhattan street contained both shirts and radios. From the facts that the truck was recovered in Brooklyn that same day so near to Schatten's garage, that Schatten was himself the owner of a trucking company and thereby undoubtedly familiar with the operations of other truckers generally and that Schatten possessed some of the stolen goods so soon after the theft, there was a sufficient predicate for the prosecutor to suggest to the jury that Schatten might well have been involved in this theft.* The evidence is undis-

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* This Court has not decided "whether, in the abstract, the inference of participation in the theft from unexplained possession of recently stolen goods comports with due process requirements" (citations omitted) in a case where, without the inference, the Government has not established an element of the offense. *United States* v. *Tavoularis*, 515 F.2d 1070, 1074-1075 (2d Cir. 1975). The Government is not here suggesting that

[Footnote continued on following page]

puted that some of the goods stolen from Greenspun's truck were sold to Goldberger. The only reasonable inference is that Greenspun's truck was stolen so that the goods in it could be sold by the thieves. Accordingly, both the 1970 and 1974 misconduct involved the theft of a merchantable quantity of goods, including radios, which were to be sold for profit. The jury could properly have considered the commonality of those facts in determining whether Schatten could have had possession of the shirts stolen from Greenspun's truck without knowledge of their stolen character.

In any event, and notwithstanding Schatten's present assertions to the contrary (Brief at 36), at no time did the prosecutor argue that proof of the prior misconduct evidenced Schatten's criminal character or propensity to commit the crime charged. Indeed, in his rebuttal summation the prosecutor explicity rejected any such use of the evidence of prior misconduct:

> "For instance, the government did not contend as Mr. Cooper tried to suggest, because Mr. Schatten had been covicted one time previously for a similar offense, that that necessarily says he committed the crime that you must consider.
>
> The government does contend that the prior conviction which Mr. Schatten said he pleaded guilty is one factor in that you may consider in determining whether Mr. Schatten is worthy of your belief." (T. 232-233).

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such an inference alone is sufficient to prove an element of the offense beyond a reasonable doubt, only that such an inference may be argued to the jury on the facts of this case. Moreover, this Court has said that even if the inference the prosecutor asked the jury to draw was untenable, that would not be grounds for reversal. *United States* v. *Center Veal & Beef Co.*, 162 F.2d 766, 770 (2d Cir. 1947).

Finally, Schatten also objects to references in the Government's summation to Schatten's failure to call Artie or his wife as witnesses. These statements of course were simply comments on the incredible nature of Schatten's testimony. In view of the fact that Schatten had testified, there could be no prejudice in commenting on Schatten's failure to call witnesses available to the defense but not to the Government.* Although the Government may not comment on the failure of a defendant to testify in his own behalf, *Griffin* v. *California*, 380 U.S. 609 (1965), when the defendant has testified, the Government may comment on the defendant's failure to call witnesses available only to the defense. *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).

POINT V

The Court's charge was proper.

Schatten contends that the District Court committed reversible error in three aspects of its charge to the jury. Schatten says that the Court should have marshalled the evidence; he complains that the Court's instruction on the jury's consideration of Schatten's prior conviction should have included Schatten's explanation of the facts underlying this conviction; and he says the Court's instruction on the inference to be drawn from possession of recently stolen goods was improper.

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* Schatten's wife could not be compelled by the Government to be a witness against her husband, *United States* v. *Fisher*, 518 F.2d 836 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3358 (December 15, 1975) and Artie was unavailable to the Government because his last name and whereabouts were unknown to it.

The Court's charge was entirely proper. Each aspect of the charge was supported by the facts in this case and by the prevailing law in this Circuit. Schatten's trial counsel expressed no suggestion or objection when the Court discussed its proposed charge with counsel (Tr. 192-198). At the conclusion of the Court's charge, the only objection by Schatten's counsel was that he asked the Court to charge "that circumstantial evidence must be proven by the government and complete a chain." (Tr. 257). This objection has nothing to do with the points Schatten now raises. Schatten's failure to raise at trial the objections he now asserts precludes reversal. *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir., January 12, 1976) slip op. 6577, 6583; *United States* v. *Goldberg*, Dkt. No. 75-1229 (2d Cir., November 26, 1975) slip op. 753, 761; *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Kahaner*, 317 F.2d 459, 475 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); Rule 30, Fed.R.Crim. P. Schatten's objections do not approach plain error, as they might if the Court had failed to instruct on an element of the offense, *United States* v. *Howard*, 506 F.2d 1131, 1133-1134 (2d Cir. 1974), or on the issue of voluntariness of a confession. *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975); See Rule 52(b), Fed.R. Crim.P.

Schatten's complaint that the Court failed to tell the jury about his explanation of his prior conviction is frivolous.* The Court's instruction that the jury could consider Schatten's prior conviction in evaluating his testimony was contained in two short sentences:

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* The basis for this objection is essentially that the Court did not marshall the evidence. As is discussed below, marshalling the evidence was not required in this case.

> "Evidence that the defendant has a previous conviction may also be considered by the jury in weighing his credibility. That a person has such a conviction does not mean he cannot tell the truth. It is simply a factor for the jury to consider in determining credibility." (Tr. 251).

This short instruction was a balanced, accurate statement of the law. *Cf. United States* v. *Passero*, 290 F.2d 238, 246 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961). The Court in its charge did not relate the factual claims of either side. There was no need to do so at this point in the instructions, particularly after so short a trial. Inevitably Schatten would have complained if the Court had recounted his explanation of his prior conviction because the explanation itself was so incredible that it provided a further basis, beyond the conviction itself, for disbelieving Schatten's testimony. In any event, this Court has said that although the District Court may instruct the jury about the specific nature of the defendant's prior conviction and the extent of its relevance to his credibility, the Court is not required to do so even when the defendant specifically requests such a charge. *United States* v. *Palumbo*, 401 F.2d 270, 274 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969). Where there has been no specific request, as here, the omission of such an instruction simply affords no grounds for relief.

Schatten's complaint that the Court failed to marshall the evidence stands on the same footing as his complaint that the Court did not relate his exculpatory version of his prior conviction. There is no requirement that the Court marshall the evidence, particularly not in this short, simple case where the presentation of the evidence lasted only one day, the jury deliberated the following, there was one defendant and a one-count indict-

ment. *Cf. United States* v. *Owens*, 263 F.2d 720, 723 (2d Cir. 1959).*

Schatten's third objection to the Court's charge is directed to the standard charge on the inference the jury may draw from the possession of recently stolen goods. The Court told the jury:

> "[P]ossession of goods recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew that the goods had been stolen" (Tr. 248).

This Court approved substantially the same charge in *United States* v. *McCarthy*, 473 F.2d 300, 306-307 (2d Cir. 1972). See also *United States* v. *Curiale*, 414 F.2d 744, 748 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969); *United States* v. *Hart*, 407 F.2d 1087, 1091 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969).

Schatten contends that this instruction was improper because there was insufficient evidence that he had dominion or control over the stolen merchandise.** The

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* Even in a complicated case the Court is not required to marshall the evidence. *United States* v. *Gillilan*, 288 F.2d 796 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961). This Court has urged marshalling of the evidence in one complicated case, *United States* v. *Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966) and questioned the wisdom of marshalling in another, *United States* v. *Kahaner*, 317 F.2d 459, 479-480 n. 12 (2d Cir.), *cert. denied* 375 U.S. 835 (1963).

** In his brief Schatten disingenuously relies on *United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973), noting that the Court in *Baum* at 1328 cited *United States* v. *Kearse*, 444 F.2d 62, 63 (2d Cir. 1971); *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). Schatten implies that the reversal in *Baum* related to the sufficiency of the proof of the defendant's possession. Al-

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sufficiency of the evidence establishing Schatten's constructive possession of the goods has been discussed in Point I, *supra*. This Court has approved the use of the instruction which advises the jury that they may infer the fact of guilty knowledge from the fact of unexplained recent possession even when the possession has been constructive rather than actual. *United States* v. *McCarthy*, *supra*, 473 F.2d at 307. See also *United States* v. *Curiale*, *supra*, 414 F.2d at 748; *United States* v. *Casalinuovo*, 350 F.2d 207, 211 (2d Cir. 1965).

Judge Wyatt's charge, which was in all respects a correct statement of the controlling law, was entirely reasonable and balanced. Each aspect of the charge was supported by the evidence. Schatten's trial counsel raised no objections on the issues Schatten now claims warrant reversal. Under all the circumstances, Schatten's claims merit no relief.

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though the Court in *Baum* said that a conviction for possession of stolen goods required evidence of dominion and control, it did not reverse on this ground, finding sufficient evidence that the defendants were in actual possession of the goods. 482 F.2d at 1328. The reversal, as to one of the two defendants, was based solely on the Government's failure to provide the defendant with sufficient notice that a Government witness would testify to a prior similar act. 482 F.2d at 1331-1332. The Government does not dispute that it must prove beyond a reasonable doubt that the defendant exercised dominion and control over the stolen goods. The Court so instructed the jury (Tr. 247). *Baum* therefore is support for none of Schatten's claims. *Casalinuovo* supports the Government's position that possession may be constructive. In *Kearse* the only evidence against the appellant was his presence at the scene where the goods were looted. The Court reversed because there was a total lack of evidence of dominion and control. *Kearse* is on its face totally unlike the facts in Schatten's case. None of these cases—*Baum*, *Kearse* or *Casalinuovo*—sugests that the Court's charge was in any way incorrect.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LAWRENCE IASON,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

TF-1425

AFFIDAVIT OF MAILING

State of New York)
County of New York)

LAWRENCE IASON, being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 3rd day of February, 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Alfred I. Rosner
277 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Foley Square, Borough of Manhattan, City of New York.

Lawrence Iason

LAWRENCE IASON
Assistant United States Attorney

Sworn to before me this

3rd day of February, 1976.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977